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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1984

EVELYN HILLIER, Individually and as Administratrix of  
the Estate of HENRY HILLIER, Deceased,

*Petitioners,*

vs.

SOUTHERN TOWING COMPANY, *et al.*,

*Respondents.*

**BRIEF OF RESPONDENT C. F. INDUSTRIES, INC.,  
AS BAREBOAT CHARTERER AND OWNER  
PRO HAC VICE OF THE BARGE CF-105-B IN  
OPPOSITION TO PETITIONERS' PETITION FOR  
A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

\*JOSEPH A. MURPHY  
LUCAS & MURPHY, P.C.  
818 Olive Street, Suite 440  
St. Louis, Missouri 63101  
(314) 421-0311

JAMES B. KEMP, JR.  
PHELPS, DUNBAR, MARKS,  
CLAVERIE & SIMS  
Hibernia Bank Building  
New Orleans, Louisiana 70112  
(504) 566-1311

*Attorneys for Respondent  
C. F. Industries, Inc.*

\*Counsel of Record

## QUESTION PRESENTED

Whether, under the admiralty rule of *restitutio in integrum*, the district court may properly divide damages recoverable for loss of society between that loss occurring from date of death to date of judgment and that loss which will occur in the future from date of judgment and award prejudgment interest on the prejudgment loss only.



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**OPINIONS BELOW**

The opinion of the court of appeals is reported at 740 F.2d 583 (7th Cir. 1984) (Petitioners' Appendix A). The opinion of the district court is reported at \_\_\_\_ F.Supp. \_\_\_\_ (N.D.Ill. 1983) (Petitioners' Appendix B).

**JURISDICTION**

The jurisdictional requisites are adequately set forth in the Petition.

## ARGUMENT

1. The Decision of the Seventh Circuit Court of Appeals in this Action is Consistent with Established and Approved Guidelines that Govern an Award of Prejudgment Interest in Admiralty.

The authority and circumstances under which an award of prejudgment interest may be awarded in admiralty are found in *The Scotland, Dyer & Others v. National Steam Navigation Company*, 118 U.S. 507, 6 S.Ct. 1174, 30 L.Ed. 153 (1886). The rationale supporting an award of prejudgment interest for suits in admiralty was well stated by the Eighth Circuit Court of Appeals in *Federal Barge Lines, Inc. v. Republic Marine, Inc.*, 616 F.2d 372, 373 (8th Cir. 1980), wherein the court held that prejudgment interest should be awarded in the interest of restitution. “. . . [S]uch an award is for the purpose of fully compensating an injured party for its losses.” *Id.* See *United States v. M/V GOPHER STATE*, 614 F.2d 1186, 1189-90 (8th Cir. 1980); *Bunge Corp. v. American Commercial Barge Line Co.*, 630 F.2d 1236 (7th Cir. 1980). See also *Socony Mobil Oil Co. v. Texas Coastal and International, Inc.*, 559 F.2d 1008, 1014 (5th Cir. 1977). The same rationale was implicitly recognized by this Court in *West v. Harris*, 573 F.2d 873 (5th Cir. 1978), *cert.denied*, 440 U.S. 946, 99 S.Ct. 1427, 59 L.Ed.2d 635 (1978).

In *West*, the Fifth Circuit held that prejudgment interest is awarded when necessary to compensate an injured plaintiff; it is not allowed when it is not a necessary element of compensation.

As above noted this Court denied certiorari, and since the appellate court remanded the case for the district court to award prejudgment interest as an element of compensation to plaintiff, it may fairly be said that this Court has implicitly recognized this rationale of awarding prejudgment interest.

It is Respondent's position herein that by affirming the denial by the district court of the Petitioners' claim for prejudgment interest for future loss of society, the court of appeals correctly

concluded that said interest was not a necessary element of compensation. This position is in accord with the above expressed guidelines.

A second guideline established by *The Scotland, supra*, and followed among the circuits is that the award of prejudgment interest, in the absence of statutory directives, rests in the discretion of the trial court. *Cargill, Inc. v. Taylor Towing Serv., Inc.*, 642 F.2d 239, 241 (8th Cir. 1981); *Bunge Corp. v. American Commercial Barge Line Co., supra*, 630 F.2d 1236; *Mid-America Transportation Co. v. Rose Barge Line, Inc.*, 477 F.2d 914, 916 (8th Cir. 1973). This Court has tacitly approved this position in *Lodges 743 & 746, International Ass'n of Machinists v. United Aircraft Corp.*, 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825, 97 S.Ct. 79, 50 L.Ed.2d 87 (1976). This guideline was followed by both the district court and the court of appeals in the present lawsuit as to an award of prejudgment interest for future losses. The cause was remanded for the sole purpose of having the district court determine whether there were any peculiar circumstances; and, if not, an award of prejudgment interest on all *past* losses was to be granted. The court of appeals' affirmance of the denial of prejudgment interest on Petitioners' future loss of society is well within the discretion permitted as above noted.

The Petitioners' argument (Page 7 of Petition) that the Seventh Circuit conceded the lack of clarity in determining the issue as to when to grant prejudgment interest on the damage award is not supported by the language cited by Petitioners in support thereof. The Seventh Circuit correctly recognized the authority of the district court to award prejudgment interest for pain and suffering and for *past* loss of society. The Seventh Circuit coupled that statement with its affirmative action of remanding the case to the district court with instructions that the district court consider whether there are any peculiar circumstances to deny an award of prejudgment interest for pain



and suffering and past loss of society. The action of the Seventh Circuit constitutes an exercise of the discretion of the court in these matters afforded under the doctrine of *restitutio integrum*. Petitioners should not be allowed to use semantics to cloud the clear language and action of the Seventh Circuit. The Seventh Circuit Court of Appeals is simply directing the district court to make the petitioners whole.

Damages for pain and suffering are past damages when, as in the instant case, they occur between the time of the injury and the death therefrom and prior to the date of judgment. The same cannot be said to support Petitioners' contention that prejudgment interest should be awarded for all loss of society damages, some of which must of necessity occur from the date of death and prior to judgment and some of which must occur in the future and subsequent to the judgment. Petitioners are no less whole in this case when prejudgment interest is denied for these *in futuro* damages of loss of society. Petitioners' damage for loss of society in the future has yet to occur and awarding prejudgment interest on this amount would result in a windfall. Prejudgment interest on Petitioners' loss of society damages would also result in a penalty on the Respondent and thus would be contrary to the general policy supporting prejudgment interest. "In admiralty . . . prejudgment interest is *not* awarded as a penalty but is in the nature of compensation for use of funds." *Socony Mobil Oil Co., Inc. v. Texas Coastal and International, Inc.*, *supra*, 559 F.2d at 1014.

The fact that some courts, as cited by the Petitioners, have awarded prejudgment interest on total damage awards should not be taken as compelling a change in the applicable standards and compel such awards by this or any other court. Rather, the entry of such awards is merely an affirmative exercise of the discretion permitted to each district court and court of appeals by this Court in assessing the propriety of damage awards in admiralty actions.

In the instant case, the acceptance by the appellate court of the “lump sum” award for pain and suffering while rejecting the “lump sum” award for loss of society entered by the district court (Page 3 of Petition) does not support the argument by Petitioners that such illustrates the need for “standards” or that such is in conflict with decisions of this Court.

In summary, the decision rendered by the Seventh Circuit Court of Appeals in this case is fully in accord with both the rationale and the discretionary guidelines established by this Court and followed in admiralty cases among the various circuits as shown above. Petitioners have failed to show the absence of guidelines to be followed by the courts. In addition Respondent has shown herein that guidelines exist and that they were followed in this case. For these reasons the petition for writ of certiorari on this point should be denied.

## 2. No Conflict Exists Among the Circuits.

The present decision by the Seventh Circuit Court of Appeals is not only consistent with established guidelines but is also in accord with other decisions by the various courts of appeals in which the issue of prejudgment interest on future losses has been fully presented. The overwhelming majority of cases cited by Petitioners involve awards of prejudgment interest for ascertainable and pecuniary damages and not prejudgment interest for nonascertainable future losses. The cited cases also do not support Petitioners’ argument that the Seventh Circuit Court of Appeals should have awarded prejudgment interest on the entire loss of society award. Upon close inspection of the cited cases a legitimate conflict among the circuits is not to be found.

The Seventh Circuit Court of Appeals in *In re Air Crash Disaster Near Chicago, Ill., etc.*, 644 F.2d 633, 645-46 (7th Cir. 1981), considered prejudgment interest as to future losses arising after trial in the context of a wrongful death action. Although that case arose from different factual circumstances

and liability was predicated on the Illinois Wrongful Death Act (Ill.Rev.Stat. Ch. 70, Sec. 2), it is controlling on the issue. The court in *In re Air Crash Disaster*, based its prejudgment interest analysis on the admiralty decisions rendered in *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir. 1961), *cert.denied*, 368 U.S. 989, 82 S.Ct. 606, 7 L.Ed.2d 596 (1962), and *National Airlines v. Styles*, 268 F.2d 400 (5th Cir. 1959), *cert.denied*, 461 U.S. 885, 80 S.Ct. 157, 4 L.Ed.2d 121 (1959). In *Moore-McCormack* and *National Airlines*, the Second and Fifth Circuits allowed awards of prejudgment interest in the death actions brought under the Death On the High Seas Act, 46 U.S.C. Secs. 761-768. Both cases illustrate two different approaches in calculating prejudgment interest.

In *Moore-McCormack*, *supra*, the future losses were discounted to the date of trial and interest was allowed only on past losses. This is the approach adopted by the court of appeals in the present case. The only distinction between *Moore-McCormack* and the present lawsuit is that in the instant case neither the district court nor the Seventh Circuit required petitioners' future loss of society damages to be discounted to present value at time of trial. The reason for this is not apparent. However, it is suggested herein that Petitioners are better off as a result. In *National Airlines*, the entire award was discounted to the date of death and interest was added to the entire amount for the period from the date of death to the date of judgment. 268 F.2d at 405-406. It should be noted that this Court denied certiorari in the *Moore-McCormack* and *National Airlines* cases.

Considering its reliance on admiralty law, *In re Air Crash Disaster* unassailably stands for the proposition that prejudgment interest should not be awarded for *in futuro* damages. The Seventh Circuit Court of Appeals stated in *In re Air Crash Disaster*, "[I]nterest is implicit in the calculation of the present value of plaintiff's . . . loss as of the date of trial." 644 F.2d at 641.

In the present lawsuit, Petitioners' ascertainable *in futuro* damages were reduced by the trial court to the present value as of the time of trial. Petitioners' *in futuro* damages for loss of society were not so discounted in this manner. Having been fully compensated for *in futuro* losses, Petitioners are therefore not entitled to prejudgment interest for future loss of society damages running from the date of judgment into the future. The reliance of the Court of Appeals upon *In re Air Crash Disaster* and upon *Moore-McCormack* is apparent in its order expressly denying prejudgment interest on Petitioners' damages for future loss of society. As such, the decision is fully consistent with decisions of the other circuits as well as decisions within the Seventh Circuit.

The discretionary power vested in the courts, as discussed above, accounts for what Petitioners believe to be a conflict among the circuits. Petitioners, however, fail to recognize that the application of the rule favoring prejudgment interest in admiralty actions is indeed discretionary. *Cargill, Inc.*, *supra*, 642 F.2d at 239. The same discretionary application of the rule has also been extended to cases other than admiralty which were determined as matters of federal law. *United States v. California State Bd. of Equalization*, 650 F.2d 1127 (9th Cir. 1981), *aff'd*, 456 U.S. 901, 102 S.Ct. 1744, 72 L.Ed.2d 157, *rehearing denied*, 456 U.S. 985, 102 S.Ct. 2261, 72 L.Ed.2d 864 (1982). It has been held *not* to be an abuse of discretion to *deny* prejudgment interest in admiralty when the district court either concludes that plaintiff has been fully compensated or that special circumstances exist. *Bunge Corp.*, *supra*, 630 F.2d at 1236.

There is thus no conflict among the circuits as all circuits follow the general rule allowing a discretionary award of prejudgment interest to insure that the plaintiff has received full compensation. This is the rule which was followed in this lawsuit. Furthermore, the general rule permitting a denial of prejudgment interest if special circumstances exist was also followed in this case. The special circumstances were that Peti-

tioners' future loss of society damages were unliquidated and were yet not discounted to present value.

The decision of the Seventh Circuit Court of Appeals is in full accord with established guidelines endorsed by this Court as discussed above. Moreover, no actual conflict exists among the circuits when the case by case discretionary power of the trial court is taken into account.

### CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LUCAS & MURPHY, P.C.

Joseph A. Murphy

818 Olive Street, Suite 440

St. Louis, Missouri 63101

(314) 421-0311

PHELPS, DUNBAR, MARKS,

CLAVERIE & SIMS

Mr. James B. Kemp, Jr.

Hibernia Bank Building

New Orleans, Louisiana 70112

(504) 566-1311

Attorneys for Respondent

C. F. Industries, Inc.